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## IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

#### SECOND APPELLATE DISTRICT

#### **DIVISION SIX**

RANDY CAMPBELL,

Defendant, Cross-Complainant and Respondent,

v.

JOSEPH COLE.

Cross-Defendant and Appellant.

2d Civil No. B231433 (Super. Ct. No. 1341942) (Santa Barbara County)

Randy Campbell, respondent, filed a cross-complaint against his former attorney, appellant Joseph Cole, alleging breach of fiduciary duty. Appellant moved to strike the cause of action under the anti-SLAPP statute, Code of Civil Procedure section 425.16. The trial court denied the motion. It concluded that the cause of action did not arise from protected speech or petitioning. Appellant appeals from the order denying the motion. We affirm.

### Factual and Procedural Background

Respondent owned 51 percent of the shares of two newspaper corporations: the Santa Barbara Independent, Inc., which published the Santa Barbara Independent, and the Ventura Independent, Inc., which published the Ventura Independent. There were three minority shareholders of both newspapers: Marianne Partridge, Richard Parker, and

<sup>&</sup>lt;sup>1</sup> All statutory references are to the Code of Civil Procedure.

Richard Grand-Jean. "Both papers' business operations were centralized in one Santa Barbara office, and the Ventura Independent's operation was overseen and directed by the Santa Barbara Independent."

In 1997 a dispute arose between respondent and the minority shareholders. Respondent wanted to continue to publish the Ventura Independent, but the minority shareholders wanted to shut it down. Respondent retained appellant to represent him in the dispute. Respondent allegedly provided "confidential information" to appellant "regarding [his] thoughts, strategies, theories on litigation, and opinions of the other shareholders." Appellant allegedly advised respondent "regarding how [he] should proceed in attempting to gain control over the Ventura Independent." The dispute was resolved, and the shareholders voted to close the Ventura Independent.

In November 2009 Southland Publishing, Inc., offered to purchase all of the shares of the Santa Barbara Independent for \$2.7 million. For his 51 percent ownership interest (1,530 shares), respondent would receive \$1,377,000.

On November 10, 2009, respondent notified the minority shareholders that he intended to sell all of his 1,530 shares to Southland Publishing for \$1,377,000. He also notified them that, pursuant to a 1986 buy-sell agreement, he was giving notice of the Santa Barbara Independent's right of first refusal to purchase his shares. In the notification respondent observed that, if the Santa Barbara Independent declined to exercise its right of first refusal, the minority shareholders would have "a right to purchase the shares at the terms offered."

The Santa Barbara Independent declined to purchase respondent's shares. On November 23, 2009, minority shareholder Marianne Partridge gave notice that she was exercising her right of first refusal to purchase all of respondent's 1,530 shares. Minority shareholder Richard Parker gave notice that he was exercising his right of first refusal to purchase up to 270 of respondent's shares.

Before Partridge gave notice, she discussed with appellant the exercise of her right of first refusal. Appellant loaned Partridge \$1.2 million for the purpose of purchasing respondent's shares. Richard Parker agreed to contribute the balance of the \$1,377,000

purchase price. In documenting the loan agreement, Partridge was represented by the law firm of Price, Postel & Parma.

Respondent was the publisher and president of the Santa Barbara Independent. Appellant and Partridge had discussions about appellant "serving as president or publisher after [Partridge's] share purchase." They also had discussions about appellant "buying shares so he could become an owner." According to appellant and Partridge, they did not reach agreement on any of these issues.

On December 29, 2009, Partridge, acting in her capacity as Secretary of the Santa Barbara Independent, gave notice that she would purchase 1,260 shares of respondent's stock and that Richard Parker would purchase the remaining 270 shares. Partridge also gave notice that, pursuant to the 1986 buy-sell agreement, the transaction would close on January 12, 2010.

Respondent refused to sell his shares to Partridge and Parker. In February 2010 Partridge filed against respondent a complaint consisting of three causes of action: breach of contract, breach of covenant of good faith and fair dealing, and breach of fiduciary duty. In addition to the recovery of damages, Partridge sought "a decree of specific performance ordering that [respondent]" transfer his shares in exchange for the payment of \$1,377,000.

Partridge's complaint alleged that on December 2, 2009, nine days after she had given notice that she was exercising her right of first refusal, respondent "submitted a 'revised proposal from Southland Publishing' dated November 30, 2009 . . . ." The revised proposal "contained an offer to purchase shares of the Company . . . at the same price as the original Southland Offer but also included a new provision . . . requiring [the Santa Barbara Independent] to increase [respondent's] compensation from about \$65,000 a year to about \$110,000 a year on a non-cancelable three-year employment contract." "On December 29, 2009, [respondent] sent an email repudiating his obligation under the Buy-Sell Agreement [to sell his shares to the minority shareholders] and asserting his right to proceed under the [revised Southland Publishing proposal] including the Employment Provision."

According to Partridge, appellant loaned her the funds necessary to proceed with her lawsuit against respondent. Partridge declared: "I have substantial concerns about how I will be able to go forward with the litigation if [appellant] is prevented from assisting me with loans to proceed . . . . " Appellant did not represent Partridge in the litigation. Partridge was represented by the law firm of Hill & Trager, LLP.

Respondent filed a cross-complaint against Partridge and appellant. The cross-complaint alleged that, because Southland Publishing's original offer "did not contain all material terms of the proposed transfer," respondent's "expressed interest in the [offer] . . . could not and did not trigger any right of first refusal held by the [Santa Barbara] Independent or any individual shareholder of the [newspaper]." The cross-complaint alleged five causes of action, two of which were against appellant: breach of fiduciary duty (fourth cause of action) and injunctive relief (fifth cause of action).

Respondent's cause of action for breach of fiduciary duty alleged that, starting in November 2009, appellant "engaged in a series of actions which were directly adverse to [respondent's] interest. Unbeknownst to [respondent], [appellant] orchestrated a calculated attempt to wrestle [respondent's] shares away from him." Appellant and Partridge "agreed [appellant] would loan money to Partridge to enable her to buy [respondent's] shares, and then immediately transfer the shares to [appellant]." "In essence," the cross-complaint asserted, "[appellant] used Partridge in an attempt to purchase [respondent's] shares without first informing [respondent] of [appellant's] intentions." After acquiring respondent's shares, appellant intended to replace respondent as publisher of the newspaper.

The cross-complaint went on to state that appellant had advised Partridge on how to go about acquiring respondent's shares and had participated in the drafting of pertinent documentation. Furthermore, "[u]pon [appellant's] request, Partridge provided many confidential corporate documents to [appellant] without ever notifying [respondent]."

"When [respondent] found out his attorney, [appellant], was the one behind the attempted takeover of his shares, he was shocked."

The cross-complaint claimed that, in addition to loaning \$1.2 million to Partridge for the purpose of purchasing respondent's shares, appellant "paid over \$70,000 of Partridge's legal fees in this matter. Moreover, when Partridge was required to post an undertaking of \$250,000 in connection with the preliminary injunction, [appellant] put up the entire \$250,000." [Appellant] has characterized his payment of \$70,000 fees and payment of the \$250,000 for Partridge's undertaking as akin to a line of credit, with no interest and no repayment date." All of appellant's actions were allegedly adverse to his former client's (respondent's) interest, in violation of the duty of loyalty that he owed to his former client.

The cross-complaint's cause of action for injunctive relief sought an order enjoining appellant from (1) participating in the litigation between Partridge and respondent, (2) "facilitating the transfer of [respondent's] shares," and (3) "obtaining any interest in [respondent's] shares."

Appellant filed an anti-SLAPP motion to dismiss the causes of action for breach of fiduciary duty and injunctive relief.

### Anti-Slapp Statute

"SLAPP" is an acronym for 'strategic lawsuit against public participation.'

[Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 815, fn. 1.) "A SLAPP suit . . . seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056; see also *People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317 ["The point of the anti-SLAPP statute is that you have a right *not* to be

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<sup>&</sup>lt;sup>2</sup> Partridge explained that appellant had loaned her "money so that [she] could get a restraining order that would preserve the status quo so that the Court could make a determination of [her] legal rights."

dragged through the courts because you exercised your constitutional rights"].)

"A defendant opposing a SLAPP claim may bring a special motion to strike any cause of action 'arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue.' (§ 425.16, subd. (b)(1).)" *Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1387.) "An anti-SLAPP motion involves a two-step process." (*Id.*, at p. 1387.) First, "[t]he defendant has the burden of making a prima facie showing that one or more causes of action arise from an act in furtherance of the constitutional right of petition or free speech in connection with a public issue.

[Citation.] The defendant need not prove that the challenged conduct is protected by the First Amendment as a matter of law; only a prima facie showing is required. [Citation.] Arguments about the merits of the claims are irrelevant to the first step of the anti-SLAPP analysis. [Citations.] The motion must be denied if the required prima facie showing is not made by the moving defendant. [Citation.]" (*Id.*, at p. 1388.)

If the trial court finds that the defendant has made the requisite prima facie showing, it then proceeds to the second step, which is to determine "'whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Oasis West Realty, LLC v. Goldman*, *supra*, 51 Cal.4th at p. 820.)

#### Trial Court's Ruling on Appellant's Anti-SLAPP Motion

The trial court denied the anti-SLAPP motion because appellant had failed to make a prima facie showing that the causes of action arose from protected speech or petitioning activity. The court concluded that the gravamen of the causes of action was not appellant's encouragement or funding of Partridge's lawsuit, but rather appellant's "actions in assisting Partridge in her efforts to purchase [respondent's] shares in the corporation." The court reasoned: "This case is about the control over a privately-held for-profit corporation. The fact that the corporation publishes a newspaper in which

people exercise rights of free speech does not make a shareholder fight within that corporation a constitutionally protected activity. Necessarily, [appellant's] involvement in one side of the shareholder fight is not protected activity." "The suit to enforce Partridge's attempted stock purchase obviously would not exist without the attempted stock purchase. Nor would there be a cross-complaint absent the attempted stock purchase. This case is . . . about . . . a shareholder dispute within a closely held corporation. Allegations regarding the funding of the litigation are incidental to the attempted stock purchase transaction."

Because the court determined that appellant had failed to show that the causes of action arose from protected speech or petitioning activity, it did not consider whether respondent had "demonstrated a probability of success on his claims."

#### Standard of Review

"If the trial court's decision is correct on any theory applicable to the case, we affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion. [Citation.] . . . [W]e independently determine whether the challenged cause of action arose from the defendant's exercise of the constitutional right of petition or free speech—and if so, whether the plaintiff has demonstrated a probability of prevailing on the merits of the claim. [Citations.] We consider 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).) 'However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." ' [Citations.]" (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 573-574.)

### Cause of Action for Injunctive Relief

In his cross-complaint, respondent alleged two causes of action against appellant: breach of fiduciary duty and injunctive relief. "'Injunctive relief is a remedy, not a cause of action.' [Citation.]" (*Guessous v. Chrome Hearts, LLC* (2009) 179 Cal.App.4th 1177, 1187.) "The anti-SLAPP statute applies only to 'causes of action.' (§ 425.16, subd.

(b)(1).) Thus, for purposes of analysis, we focus on the claim[] for [breach of fiduciary duty]." (*Wong v. Tai Jing* (2010) 189 Cal.App.4th 1354, 1361.)

#### Public Issue

Appellant concedes that "it is arguable that the allegations [in the cross-complaint] that [he] assisted or loaned money to Partridge to purchase [respondent's] shares in the Santa Barbara Independent did not involve protected activity." But appellant argues that "other allegations – specifically that [appellant] encouraged and funded the litigation against [respondent] by paying Partridge's legal fees, and putting up the \$250,000 bond in connection with the preliminary injunction – unquestionably involve protected activities."

Respondent contends that the anti-SLAPP statute is inapplicable because Partridge's litigation does not involve a public issue or an issue of public interest. We disagree. "A defendant can meet his or her burden of making a threshold showing that a cause of action is one arising from protected activity by demonstrating the acts underlying the plaintiff's cause of action fall within one of the categories of section 425.16, subdivision (e). [Citation.]" (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1054-1055.) Section 425.16, subdivision (e)(1) provides: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes . . . any written or oral statement or writing made before a . . . judicial proceeding." If a statement or writing falls within section 425.16, subdivision (e)(1), "a defendant moving to strike a cause of action arising from [the] statement [or writing] . . . need *not* separately demonstrate that the statement [or writing] concerned an issue of public significance." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. omitted.)

A defendant's act of filing a complaint "squarely falls within section 425.16, subdivision (e)(1)." (*Contemporary Services Corp. v. Staff Pro Inc.*, *supra*, 152 Cal.App.4th at p. 1055; see also *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1368-1369 ["Two of the causes of action in the cross-complaint . . . by definition arise from the protected activity of Raining Data's filing of its complaint"].) In

filing a civil action, a party incurs filing and attorney fees. Thus, if the filing of a civil action is protected activity under section 425.16, subdivision (e)(1), it follows that the funding of a civil action is also protected activity. This was recognized by our Supreme Court in *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1056: "'A cause of action "arising from" defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike.' [Citation.] 'Any act' [within the meaning of section 425.16, subdivision (b)(1)] includes communicative conduct such as the filing, *funding*, and prosecution of a civil action. [Citation.]" (Italics added.)

Principal Thrust or Gravamen of Cause of
Action for Breach of Fiduciary Duty

Where, as here, "a pleading contains allegations regarding both protected and unprotected activity, 'it is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation] . . . . ' [Citation.] Incidental allegations regarding protected activity do not 'subject the cause of action to the anti-SLAPP statute.' [Citation.]" (*PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1219-1220.) "We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' [Citation.]" (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.) <sup>3</sup>

<sup>&</sup>lt;sup>3</sup> Not all courts have applied the "principal thrust or gravamen test" to mixed causes of action. For example, see *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1288, fn. 5: "Some cases state that mixed causes of action come within the ambit of section 425.16 if the gravamen or principal thrust of the claim is protected activity. [Citations.] We agree with *Peregrine Funding* [v. Sheppard Mullin Richter & Hampton LLP (2005) 133 Cal.App.4th 658 (*Peregrine Funding*)] that this formulation of the test originated in language in a Supreme Court opinion that is not related to mixed causes of action. [Citation.] Accordingly, we do not adopt the formulation." The *Salma* court concluded: "A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity. [Citation.]" (*Id.*, at p. 1287.) But in *In re Episcopal Church Cases* (2009) 45 Cal.4th 467, 477-478, our Supreme Court impliedly endorsed the "principal thrust or gravamen test." In concluding that the trial court had erred in

We conclude that appellant failed to make a prima facie showing that the principal thrust or gravamen of respondent's cause of action for breach of fiduciary duty involved protected litigation activity. Our conclusion is supported by the following cases: *Freeman v. Schack* (2007) 154 Cal.App.4th 719 (*Freeman*); *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179 (*Benasra*); and *U.S. Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton* (2009) 171 Cal.App.4th 1617 (*U.S. Fire*).

In *Freeman* the plaintiffs sued their former attorney, Schack, for breach of fiduciary duty. The plaintiffs alleged that Schack had abandoned them and represented an adverse party in a lawsuit. The trial court granted Schack's section 425.16 motion to strike on the ground that the plaintiffs' cause of action arose from Schack's protected litigation activity while representing his new client. The appellate court reversed. It explained: "[T]he fact plaintiffs' claims are related to or associated with Schack's litigation activities is not enough. 'Although a party's litigation-related activities constitute "act[s] in furtherance of a person's right of petition or free speech," it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute. . . . A cause of action may be "triggered by" or associated with a protected act, but it does not necessarily mean the cause of action *arises* from that act. [Citation.]' "
(*Freeman*, *supra*, 154 Cal.App.4th at pp. 729-730.)

In determining that the cause of action against Schack for breach of fiduciary duty did not arise from protected litigation activity, the *Freeman* court reasoned: "[T]he principal thrust of the conduct underlying [plaintiffs'] cause[] of action is not Schack's filing or settlement of litigation. Stated another way, the 'activity that gives rise to [Schack's] asserted liability' [citation] is his undertaking to represent a party with interests adverse to plaintiffs, in violation of the duty of loyalty he assertedly owed them . . . . '[I]f the allegations of protected activity are only incidental to a cause of action based

granting the defendant's anti-SLAPP motion, the court reasoned that a property dispute, "and not any protected activity, is 'the gravamen or principal thrust' of the action. [Citation.]"

essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to any anti-SLAPP motion.' [Citation.] In our view, plaintiff's allegations concerning Schack's filing and settlement of . . . litigation are incidental to the allegation[] of . . . breach of fiduciary duty arising from his representation of clients with adverse interests." (*Freeman*, *supra*, 154 Cal.App.4th at p. 732.)

In *Benasra* the plaintiffs' former attorneys represented plaintiffs' opponent in arbitration proceedings. The plaintiffs filed an action against the attorneys, claiming that they had breached their duty of loyalty to their former clients. The trial court granted the attorneys' section 425.16 motion to strike, and the plaintiffs appealed. The appellate court reversed. It reasoned that the plaintiffs' claim "is not based on 'filing a petition for arbitration on behalf of one client against another, but rather, for failing to maintain loyalty to, and confidences of, a client.' " (Benasra, supra, 123 Cal.App.4th at p. 1189.) It was of no consequence that the attorneys did not disclose confidential information to their new client. "[T]he actual disclosure of confidences by a former attorney during litigation is not required to form the basis for the tort of breach of duty of loyalty. The breach occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client." (*Ibid.*) The court concluded that its "recent decision in Jespersen v. Zubidate-Beauchamp (2003) 114 Cal. App. 4th 624 . . . , which held that a claim for legal malpractice is not subject to a special motion to strike . . . , applies to the situation where the claim is attorney breach of duty of loyalty." (Benasra, supra, 123 Cal.Ap. 4th at p. 1181.)

"Freeman and Benasra illustrate the proper analysis to determine whether a lawsuit challenging attorneys' professional conduct is a SLAPP. In the above cited cases, it was the breach of the duty of loyalty owed to the clients that gave rise to liability, not protected speech or petitioning activity." (Coretronic Corp. v. Cozen O'Connor, supra, 192 Cal.App.4th at p. 1392.)

In *U.S. Fire* an insurance company sued to enjoin a law firm from representing a party in an action to which U.S. Fire was also a party. U.S. Fire claimed that the law firm had "a disqualifying conflict of interest arising out of [its] former representation of U.S.

Fire" in a previous matter. (*U.S. Fire, supra*, 171 Cal.App.4th at p. 1619.) The law firm filed an anti-SLAPP motion to strike the complaint, "contending that its legal representation in the [litigation] is protected activity." (*Ibid.*) The trial court concluded that U.S. Fire's complaint arose from protected activity, but it denied the anti-SLAPP motion because U.S. Fire had shown a probability of success on the merits of its claim. The appellate court affirmed on the ground that the law firm had failed to show that the complaint arose from protected activity. The court reasoned: "U.S. Fire's complaint against [the law firm] focuses on the attorney-client relationship between them, and seeks relief based on a claim of successive representation conflict of interest . . . . " (*Id.*, at p. 1628.) "Therefore, the principal thrust of the misconduct averred in the underlying complaint is the acceptance by [the law firm] of representation adverse to U.S. Fire." (*Ibid.*) "We agree with U.S. Fire that the primary objective of the complaint is to stop [the law firm] from participating *at all* in the [litigation] given its duty of loyalty to the insurer." (*Id.*, at p. 1629, fn. 9.)

Here, as in *Freeman*, *Benasra*, and *U.S. Fire*, the principal thrust or gravamen of the conduct underlying respondent's cause of action is not appellant's funding of the Partridge lawsuit. The principal thrust or gravamen is the breach of appellant's duty of loyalty to respondent that allegedly occurred when he abandoned his former client and assisted Partridge in her attempt to acquire respondent's shares. That breach, which preceded appellant's funding of Partridge's lawsuit, is similar to the breach that occurred in *Freeman*, *Benasra*, and *U.S. Fire* when the attorneys accepted representation adverse to their former clients. As in those cases, the breach of appellant's duty of loyalty is not protected conduct under the anti-SLAPP statute and is "[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' [Citation.]" (*Hylton v. Frank E. Rogozienski, Inc., supra*, 177 Cal.App.4th at p. 1272.)

Appellant argues that *Freeman*, *Benasra*, and *U.S. Fire* are distinguishable "since [he] is being sued for his protected petitioning activities of funding and encouraging Partridge's litigation and not for accepting adverse representation." Appellant maintains that he "was not acting in his capacity as an attorney [when he assisted Partridge] and did

not "accept the representation of a new client." Respondent, on the other hand, contends that appellant formed "an attorney-client relationship with Partridge" because he gave her legal advice. "'"When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established *prima facie*." [Citation.] "The absence of an agreement with respect to the fee to be charged does not prevent the relationship from arising." [Citation.]' [Citations.]" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1148; see also *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 126 ["An attorney-client relationship can be formed though no retainer is signed or no fees are paid"].)

We need not decide whether, for purposes of the anti-SLAPP motion, appellant should be deemed to have represented Partridge. This issue goes to the merits of respondent's cause of action and therefore concerns the second prong of the anti-SLAPP analysis – whether respondent " 'has demonstrated a probability of prevailing on the claim.' " (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at p. 820.) Appellant is in effect arguing that the breach of fiduciary duty claim cannot be established because, unlike the attorneys in *Freeman, Benasra*, and *U.S. Fire*, he did not undertake the successive representation of clients with adverse interests. Since appellant has failed to satisfy the requirements of the first prong - that respondent's cause of action arises from protected speech or petitioning - we do not consider the merits of respondent's claim. (*Coretronic Corp. v. Cozen O'Connor, supra*, 192 Cal.App.4th at pp. 1389-1390.)

Moreover, a recent California Supreme Court case shows that the distinction drawn by appellant between the instant case and *Freeman*, *Benasra*, and *U.S. Fire* is in fact a distinction without a difference. The case is *Oasis West Realty*, *LLC v. Goldman*, *supra*, 51 Cal.4th 811. There, attorney Goldman represented Oasis in its effort to obtain approval of a redevelopment project. About two years after Goldman terminated the representation, he became involved in a political campaign to thwart the redevelopment project. Oasis sued Goldman for breach of fiduciary duty. Goldman filed an anti-SLAPP motion to strike the complaint. "The trial court held that the anti-SLAPP statute did not

apply, in that the gravamen of the causes of action was not Goldman's petitioning activity but his breach of the duties of loyalty and confidentiality." (*Id.*, at p. 815.)

Our Supreme Court did not consider the first prong of whether Goldman had made a prima facie showing that the cause of action arose from protected activity. Instead, it proceeded "directly to the second prong, inasmuch as we have readily found that Oasis has demonstrated a probability of prevailing on its claims." (Oasis West Realty, LLC v. Goldman, supra, 51 Cal.4th at p. 820.) The court relied on the rule that " 'an attorney is forbidden to do either of two things after severing [the] relationship with a former client. [The attorney] may not do anything which will injuriously affect [the] former client in any matter in which [the attorney] formerly represented [the client] nor may [the attorney] at any time use against [the] former client knowledge or information acquired by virtue of the previous relationship.' [Citations.]" (*Id.*, at p. 821.) The court rejected Goldman's argument that this duty applies "in only two specific circumstances: (1) where the attorney has undertaken a concurrent or successive representation that is substantially related to the prior representation and is adverse to the former client, or (2) where the attorney has disclosed confidential information." (*Id.*, at p. 822.) The court noted: "It is well established that the duties of loyalty and confidentiality bar an attorney not only from using a former client's confidential information in the course of 'making decisions when representing another client,' but also from 'taking the information significantly into account in framing a course of action' such as 'deciding whether to make a personal investment' – even though, in the latter circumstance, no second client exists and no confidences are actually disclosed. [Citation.]" (*Id.*, at pp. 822-823.)

Accordingly, it matters not whether an attorney-client relationship existed between appellant and Partridge. Appellant could still breach his duty of loyalty to respondent if he were acting on his own behalf and not on behalf of a new client. Appellant, therefore, has failed to satisfy the first prong of the anti-SLAPP statute, i.e., he has failed to make a prima facie showing that the principal thrust or gravamen of the cause of action for breach of fiduciary duty involved protected speech or petitioning activity.

#### Cases Distinguished

Fremont Reorganizing Corp. v. Faigin (2011) 198 Cal.App.4th 1153 (Fremont), is distinguishable. Faigin, an attorney, sued his former employer for wrongful termination. The employer cross-complained against Faigin for breach of fiduciary duty. The cause of action was based exclusively on Faigin's statements to the California Insurance Commissioner that the employer was planning to engage in unlawful conduct. The trial court granted Faigin's anti-SLAPP motion to strike the cause of action. The appellate court concluded that the cause of action arose from protected conduct because "the gravamen or principal thrust . . . is that Faigin breached his professional duties owed to his former clients by making the statements to the Commissioner." (*Id.*, at p. 1167.) Those statements were protected pursuant to section 425.16, subdivision (e)(2), which encompasses statements "made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (*Ibid.*)

The appellate court distinguished *Faigin* from other cases that found "the anti-SLAPP statute inapplicable in actions against attorneys for breach of professional duties." (*Fremont, supra*, 198 Cal.App.4th at p. 1170.) The cases distinguished included *Freeman, Benasra*, and *U.S. Fire*. These other cases "held that the anti-SLAPP statute was inapplicable . . . because the gravamen or principal thrust of the particular causes of action did not concern a statement made in connection with litigation, but instead concerned some other conduct allegedly constituting a breach of professional duty. [Citations.]" (*Id.*, at p. 1170.) The appellate court continued: "These cases are distinguishable because the gravamen of [the] count[] for breach of . . . fiduciary duty . . . is that Faigin violated his professional duties owed to his former clients by making the statements to the Commissioner, rather than by some other conduct." (*Ibid.*) Thus, "Faigin's statements made to the Commissioner are not merely incidental to these causes of action." (*Ibid.*)

Here, in contrast to *Fremont*, the gravamen of respondent's cause of action for breach of fiduciary duty is not protected statements made by appellant. The gravamen is

the advisory and financial assistance that appellant provided to Partridge in her attempted hostile takeover of respondent's controlling interest in the Santa Barbara Independent. As the trial court observed, "Allegations regarding the funding of the litigation are incidental to the attempted stock purchase transaction." This transaction does not constitute protected speech or petitioning activity.

Peregrine Funding, supra, 133 Cal.App.4th 658, is also distinguishable. There, plaintiffs sued a law firm, Sheppard. In a prior lawsuit filed by the Securities and Exchange Commission (SEC), Sheppard had concurrently represented both plaintiffs and the perpetrators of a Ponzi scheme. Plaintiffs claimed that, to their detriment, Sheppard's "negligence and affirmative misconduct helped the perpetrators of the scheme avoid detection and prosecution by [the SEC]." (*Id.*, at p. 665.)

Plaintiffs' complaint against Sheppard alleged causes of action for legal malpractice and aiding and abetting a breach of fiduciary duty. The trial court denied Sheppard's anti-SLAPP motion to strike, and Sheppard appealed. The appellate court agreed "with the trial court that the essence, or gravamen, of plaintiffs' claims is that Sheppard breached duties of care and loyalty owed to them." (*Peregrine Funding, supra*, 133 Cal.App.4th at p. 671.) But the appellate court decided that the law firm had satisfied the first prong of the anti-SLAPP statute because it had shown that "plaintiffs' claims are based in significant part on [Sheppard's] petitioning activity in . . . litigation." (*Id.*, at p. 675.) The court explained: "Although the overarching thrust of plaintiffs' claims may be that Sheppard's conduct helped advance the Ponzi scheme – to their detriment – some of the specific conduct complained of involves positions the firm took in court, or in anticipation of litigation with the SEC. We cannot conclude these allegations of classic petitioning activity are merely incidental or collateral to plaintiff[s'] claims against Sheppard." (*Id.*, at p. 673.) The court noted that the complaint alleged that plaintiffs had suffered substantial losses because of specific acts of protected petitioning activity. "These allegations of loss resulting from protected activity distinguish this case from other cases finding certain claims against lawyers were not subject to a motion to strike under section 425.16." (*Ibid.*)

In his cause of action for breach of fiduciary duty, respondent alleged that his "damages include incurring expenses and attorneys' fees in defending [against Partridge's] action." We assume that these expenses and fees are substantial. *Peregrine Funding*, therefore, arguably supports the granting of appellant's anti-SLAPP motion. "Where, as here, a cause of action alleges the plaintiff was damaged by specific acts of the defendant that constitute protected activity under the statute [e.g., the funding of Partridge's lawsuit], it defeats the letter and spirit of section 425.16 to hold it inapplicable because the liability element may be proven without reference to the protected activity." (*Peregrine Funding*, *supra*, 133 Cal.App.4th at p. 674.)

The *Peregrine Funding* court's reasoning was criticized in *PrediWave Corp. v. Simpson Thacher & Bartlett LLP*, *supra*, 179 Cal.App.4th 1204, 1228.

"Whether or not the *Peregrine Funding* court correctly applied section 425.16, the facts before us call for a different outcome." (*Robles v. Chalilpoyil, supra*, 181 Cal.App.4th at p. 580.) The *Peregrine Funding* court concluded that plaintiffs' allegations of petitioning activity were not "merely incidental or collateral to [their] claims against Sheppard." (*Peregrine Funding, supra*, 133 Cal.App.4th at p. 673.) Here, in contrast, respondent's allegations that appellant funded Partridge's lawsuit are incidental to the claim that appellant breached his duty of loyalty to a former client because he "orchestrated, directed, and facilitated the attempted forced takeover of his client's . . . shares against [his client's] wishes." Thus, unlike *Peregrine Funding*, respondent's cause of action is not "based in significant part on [appellant's] petitioning activity in . . . litigation." (*Id.*, at p. 675.)

"Since [appellant] did not make the requisite [prima facie] showing, [respondent] was not required to establish a probability of prevailing on the merits of [his] claim[] and we need not reach that issue. Our conclusions do not reflect any evaluation of the merits of [respondent's] present lawsuit." (*PrediWave Corp. v. Simpson Thacher & Bartlett LLP*, *supra*, 179 Cal.App.4th at p. 1228.)

# Disposition

The order denying appellant's anti-SLAPP motion is affirmed. Respondent shall recover his costs on appeal.

## NOT TO BE PUBLISHED.

We concur:		YEGAN, J.	
	GILBERT, P.J.		
	PERREN, J.		

# Denise de Bellefeuille, Judge Superior Court County of Santa Barbara

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Lewis, Brisbois Bisaard & Smith, Raul Martinez, for Appellant

Griffith & Thornburgh, John R. Rydell II and John C. Eck, for Respondent.